No. 03-1303 MAR 11 2004

In The
Supreme Court of the United States

GRANT T. COGSWELL,

Petitioner,

v.

CITY OF SEATTLE AND CITY OF SEATTLE ETHICS AND ELECTIONS COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Before each primary and general election, the City of Seattle Ethics and Elections Commission prepares a local voters' pamphlet in which candidates for political office are permitted to include campaign statements. A Seattle ordinance provides that "[a] candidate's campaign statement shall not discuss the opponent." Seattle Municipal Code 2.14.060(C). A rule of the City of Seattle Ethics and Elections Commission similarly provides that "[t]he written submittal must not discuss the candidate's opponent(s)." Voters' Pamphlet Administrative Rule 5.3.

The question presented is whether this restriction – which permits a candidate for political office to discuss his or her own candidacy, but which prohibits the candidate's opponents from discussing the same subject – discriminates on the basis of viewpoint and thus abridges the freedom of speech in violation of the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

GRANT T. COGSWELL, an individual;

CITY OF SEATTLE, a municipal corporation;

CITY OF SEATTLE ETHICS AND ELECTIONS COMMISSION, a commission established under the Seattle Municipal Code.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1-16) is reported at 347 F.3d 809. The order of the court of appeals denying the petition for rehearing and rehearing en banc (App. 30) is not reported. The opinion of the district court (App. 17-25) is not reported.

JURISDICTION

The opinion of the court of appeals was issued on October 27, 2003. The court denied Cogswell's petition for rehearing and suggestion for rehearing en banc on December 12, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

The Speech Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Due Process Clause of the Fourteenth Amendment provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . . " U.S. Const. amend. XIV, § 1. Relevant provisions of the Revised Code of Washington, the Seattle Municipal Code, and the City of Seattle Ethics and Elections Commission Voters' Pamphlet Administrative Rules and Video

Voters' Guide Rules for Participation are set forth in the appendix to this petition.

STATEMENT OF THE CASE

This case involves a prohibition of one of the most basic forms of political speech – a candidate's ability to address an opponent's qualifications for public office. The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office," *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), and this Court has recognized that "debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) (internal quotation marks and citation omitted). Like many jurisdictions, Seattle has opened a forum for candidates in city elections to address the voters directly through a publicly financed voters' pamphlet. But in reality, the Seattle forum is far from open, because Seattle prohibits candidates from making any reference to their opponents. While candidates are free to discuss their records, qualifications, and reasons for seeking office, their opponents are prohibited from presenting opposing viewpoints on the same subjects.

Petitioner Grant T. Cogswell ran for a seat on the Seattle City Council in significant part because of his opposition to the record of that seat's then-current occupant – Richard McIver, the Chair of the City Council's Transportation Committee. Yet, because of the Seattle prohibition on reference to a candidate's opponent, the incumbent McIver could trumpet his political record as a

basis for reelection in his candidate statement while Cogswell, his opponent, was barred from presenting his opposing viewpoint on that same record. The court of appeals' decision upholding Seattle's speech prohibition squarely conflicts with this Court's consistent disapproval of viewpoint-based speech restrictions in limited public forums. The decision is also the latest example of lower court confusion regarding the distinction in this Court's jurisprudence between permissible subject-matter limitations and unconstitutional viewpoint discrimination.

1. In 2001, Cogswell ran in the non-partisan, at-large elections for Seattle City Council. Cogswell was politically active in local and regional transportation issues. In particular, in 1997, Cogswell co-authored and ran a successful campaign for a voter initiative establishing a public development agency to build a 40-mile monorail line for the City. Seattle voters approved the initiative, but the City Council ultimately refused to provide funding for the monorail's development, in effect legislatively repealing the initiative and thereby ignoring the expressed will of the voters. One of the City Council members blocking the monorail project was Richard McIver, the Chair of the City Council's Transportation Committee. McIver also was a member of the board of directors of Sound Transit, a regional public transit agency, that failed to support the Seattle voter-approved monorail project.

Cogswell chose to run for the City Council seat then occupied by McIver specifically because of this record on local transportation issues. McIver, in turn, ran for reelection based in part on his record in office, including his record as Chair of the Transportation Committee. For example, in the 1997 voters' pamphlet, McIver printed a candidate statement that celebrated his accomplishments

on transportation matters such as bridge and road repair, extending bicycle paths, and building a light rail mass transit system.

As a first-time candidate with substantially less money and name recognition than his incumbent opponent, Cogswell counted on his ability to include a candidate statement in the local voters' pamphlet. As authorized by both Washington state law and Seattle city ordinance, the City of Seattle Ethics and Elections Commission ("Commission") prepares and publishes a voters' pamphlet before each election. *See* Wash. Rev. Code § 29.81A.010 *et seq.*; Seattle Municipal Code 2.14.010 *et seq.* The local voters' pamphlets are mailed to every residence in Seattle, and the City bears the costs of printing and mailing with regard to statements by candidates for city offices and information on city-related measures. *See* Wash. Rev. Code §§ 29.81A.060, 29.81A.070.

Seattle permits candidates to submit "campaign statements" for inclusion in its local voters' pamphlets. *See* Seattle Municipal Code 2.14.010(A)(2). According to the Commission, the purpose of the voters' pamphlet is "to assist [voters] in making informed choices for the City positions" that appear on the ballot. Seattle has adopted an ordinance, however, that prohibits candidates from making any mention of their opponents in the candidate statements:

> The candidate's statement shall not exceed four hundred (400) words. No obscene, profane, libelous or defamatory matter, or language, which may impair circulation of the pamphlet through the mail, shall be accepted. *A candidate's campaign statement shall not discuss the opponent.*

Seattle Municipal Code 2.14.060(C) (emphasis added). App. 32. The Commission Pamphlet Administrative Rule 5.3 similarly provides that a candidate's "written submittal must not discuss the candidate's opponent(s)." App. 32. Finally, in 2001, a Commission rule governing a parallel video voters' guide also prohibited candidates from "includ[ing] a discussion of or reference to the candidate's opponent(s)." 2001 Commission Video Voters' Guide Rule for Participation 3.5.[1] App. 32.

In both their plain language and historical application, these prohibitions apply only to candidates' references to their opponents. Candidates remain free to discuss other persons in voters' pamphlet candidate statements and, as Cogswell demonstrated in the district court, candidates for Seattle city office have done so. For example, one candidate for Seattle City Council devoted most of his voters' pamphlet statement to discussion of an allegedly abusive police officer while another candidate railed against inherited wealth and decried non-candidates Al Gore, Sr., George Bush, Sr., and

[1] The Washington state statute authorizing local voters' pamphlets requires localities to "adopt and publish administrative rules necessary to facilitate the provisions of any ordinance authorizing production of a local voters' pamphlet." Wash. Rev. Code § 29.81A.030. App. 31. The statute further provides that the "rules shall include but not be limited to the following: . . . (3) The basis for rejection of any explanatory or candidates' statement or argument deemed to be libelous or otherwise inappropriate. Any statements by a candidate shall be limited to those about the candidate himself or herself[.]" *Id.* As the district court concluded, and the court of appeals did not dispute, § 29.81A.030(3) permits "the presentation of all information about the candidate and his candidacy, even if a proper introduction would require mention of an opponent." App. 31. In fact, as Cogswell showed in the district court, most Washington jurisdictions take a speech-protective view of the statute and thus permit candidates to compare themselves to their opponents in local voters' pamphlet candidate statements.

Bill Gates, Sr. As the City itself explained below, Seattle does not restrict such discussion because "[a] prohibition on references to third parties would necessarily limit candidates' ability to talk about themselves." Defts.' Mem. in Opp. to Pltf's. Mot. for Summ. J. at 10 n.9. The only speech barred by the rule is a candidate's view of his or her opponent – core political speech about candidates for public office, many of whom are current officeholders.

On July 30, 2001, Cogswell submitted a candidate statement to the Commission for use in the voters' pamphlet. The statement included the following paragraph, which set forth for voters one of Cogswell's primary bases for seeking a seat on the City Council:

> Sound Transit refuses to consider Monorail even though Seattle voted for it twice. The incumbent, Councilmember McIver, was originally appointed – not elected – to his seat on the city council in 1996. Since taking office, McIver has served as a key board member of Sound Transit and lobbied against grants for Monorail from that agency; voted for the legislation that repealed the first Monorail Initiative; hesitated to stand against the forces on regional committees who want more lanes on S[tate] R[oute] 520, and is failing to pursue sensible public transportation solutions for the city and the region.

By letter dated July 31, 2001, the City rejected Cogswell's proffered statement because it referred to his opponent. The City has never claimed that any assertions in the paragraph were false. Under protest, Cogswell submitted an alternative candidate statement that did not contain the above-quoted paragraph. Cogswell also taped an alternative video statement under protest.

2. Cogswell filed a complaint in the United States District Court for the Western District of Washington on August 7, 2001, seeking declaratory and injunctive relief and nominal damages. Cogswell maintained that the Seattle prohibition on candidate reference to an opponent, on its face and as applied to him, discriminates on the basis of viewpoint in violation of the First and Fourteenth Amendments. On cross-motions for summary judgment, the district court, holding jurisdiction under 28 U.S.C. §§ 1331 and 1343, ruled in Cogswell's favor. App. 17-25.

The district court recognized that "the constitutional guarantee of free speech has its 'fullest and most urgent application' in the political arena." App. 19 (quoting *Brown v. Hartlage*, 456 U.S. 45, 53 (1982)). The parties agreed that First Amendment standards applicable to limited public forums govern the present case. One such standard is that any restriction of speech in the forum must "not discriminate on the basis of viewpoint." App. 20 (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001)). The district court held that Seattle's prohibition on candidates' discussion of their opponents violated that standard:

> The rule established by *Lamb's Chapel* [v. *Center Moriches Union Free School District*, 508 U.S. 384, 394 (1993)] is clear: restrictions on speech which curtail only one side of an issue or one viewpoint on an otherwise acceptable subject constitute prohibited viewpoint discrimination. In the case at hand, one participant in the limited public forum, namely the incumbent, is permitted to discuss the incumbent's voting record, the projects he's supported, and his successes as an elected official. All of those topics are permissible in the forum, but only from the viewpoint of

> the incumbent. All other individuals who are admitted to the forum, namely all of the challengers, are precluded from offering their views on those very same topics.

App. 21-22 (footnotes and citations omitted). The district court also specifically rejected the City's argument that its speech prohibition operated as a mere subject-matter restriction:

> While any restriction on speech threatens the purposes for which the First Amendment was created, viewpoint-based restrictions are of the greatest concern. Subject-matter restrictions simply remove entire topics of debate from public discourse and public notice. Restrictions on viewpoint, however, affirmatively skew the debate by allowing only one side, or one viewpoint, to be presented to the populace. In the circumstances of this case, allowing the incumbent to talk about his record and achievements while denying plaintiff the opportunity to talk about those same topics provides the public with only one side of a debatable subject and deprives plaintiff of a fair opportunity to present himself and his candidacy to the voters. The City's ordinance is, therefore, viewpoint discriminatory and unconstitutional.

App. 23-24 (citations omitted). Two months later, the district court entered a final judgment in Cogswell's favor, declaring the Seattle speech prohibition unconstitutional under the First Amendment as incorporated by the Fourteenth Amendment. App. 26-28.

3. The United States Court of Appeals for the Ninth Circuit reversed. App. 1-16. The court first noted that "[t]he line between an acceptable subject matter limitation

and unconstitutional viewpoint discrimination is not a bright one." App. 9. Nevertheless, the court held that the Seattle speech prohibition fell on the constitutionally acceptable subject-matter side of that line, and not the unconstitutional viewpoint side. The court acknowledged that, "[i]n their candidate statements, candidates may discuss themselves, their qualifications and their backgrounds." App. 11. The court also agreed that the Seattle candidate statement rules plainly prohibited candidates' opponents from addressing the same subjects. *See* App. 10-13. Yet the court of appeals rejected Cogswell's argument – endorsed by the district court – that the speech prohibition therefore constituted viewpoint discrimination. The court of appeals did so through a semantic exercise, simply redefining the excluded *viewpoint* as an excluded *subject matter*:

> The restriction acceptably limits the subject matter of the forum to candidate self-discussion. Candidate criticism of an opponent is not included within the subject matter of Seattle's limited public forum. Viewed in this light, Cogswell's submission discussed matters outside the scope of the limited public forum and, therefore, could properly be rejected.

App. 10. In short, the court of appeals attached the label "criticism" to Cogswell's opposing viewpoint regarding McIver's record, and then used the label to justify excluding the speech from the forum on the theory that "criticism" was an excluded subject matter.

4. The court of appeals denied Cogswell's petition for panel rehearing and suggestion for rehearing en banc on December 12, 2003. App. 30.

ARGUMENT

The decision of the court of appeals contravened well-established precedent of this Court on an important First Amendment issue of viewpoint discrimination, warranting this Court's review.

When the state opens a forum for the discussion of certain subjects, it may not then silence certain participating speakers who address those subjects from a particular perspective. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). While paying lip service to these precedents, the court of appeals' decision upholding Seattle's prohibition on candidate speech ignored this Court's teachings. Seattle's prohibition on candidate speech discussing an opponent is a textbook example of viewpoint discrimination. Although Seattle allows candidates to present their records, qualifications, and reasons for seeking office in the voters' pamphlet, their opponents are forbidden from expressing their opposing views on the same subjects. Nonetheless, the court of appeals upheld Seattle's speech prohibition as a subject-matter limitation rather than striking it down as viewpoint discrimination.

The decision thus presents this Court with a well-defined question under the First Amendment: whether rules governing speech in a limited public forum that permit one participating speaker to address a subject, but that prohibit other participating speakers from addressing the same subject because of their perspective, discriminate on the basis of viewpoint. The lower courts have struggled to apply this Court's precedents distinguishing between subject-matter limitations and viewpoint-based restrictions in

limited public forums. This case, which involves political speech in a context where the First Amendment "has its fullest and most urgent application," *Monitor Patriot Co.*, 401 U.S. at 272, presents an important First Amendment question and warrants this Court's review.

1. Under the First Amendment, "[t]here is an equality of status in the field of ideas, and the government must afford all points of view an equal opportunity to be heard." *Carey v. Brown*, 447 U.S. 455, 463 (1980) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972)); *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (law preventing government-funded lawyers from seeking to invalidate or challenge existing laws is viewpoint-based). This rule against viewpoint discrimination extends to limited public forums, where the government otherwise has some ability to restrict the identity of eligible speakers or the subject matters those speakers can address in the forum. As this Court has held, restrictions imposed in a limited public forum "must not discriminate against speech on the basis of viewpoint." *Good News Club*, 533 U.S. at 106-07 (internal quotation marks and citations omitted); *see also Rosenberger*, 515 U.S. at 829.[2]

In the past decade, this Court has invalidated a number of government speech restrictions in limited public forums because they discriminated on the basis of viewpoint. *See, e.g., Good News Club*, 533 U.S. 98;

[2] Throughout this litigation, the parties have agreed that Seattle's voters' guide constitutes a limited public forum. *See* App. 7; *see also Good News Club*, 533 U.S. at 106 ("Because the parties have agreed that Milford created a limited public forum when it opened its facilities in 1992, we need not resolve the issue here.").

Rosenberger, 515 U.S. 819; *Lamb's Chapel*, 508 U.S. 384. Most recently, in *Good News Club*, the Court held unconstitutional a public school's exclusion of a religious club from after-hours use of the school's facilities. Although the school opened a forum for events "pertaining to the welfare of the community," including meetings to discuss subjects like child rearing and the development of character and morals, it excluded the religious club from using the facility for the discussion and teaching of the same subjects from a religious perspective. 533 U.S. at 108 (internal quotation marks and citation omitted). Because the school had permitted discussion of all views on subjects "pertaining to the welfare of the community," except for views on this subject from a religious perspective, the Court found it "quite clear that [the school] engaged in viewpoint discrimination when it excluded the Club from the afterschool forum." *Id.* at 108-09.

Similarly, in *Rosenberger*, the Court invalidated a university regulation that prohibited reimbursement of student groups for religious activities. The university offered reimbursement for costs associated with the discussion of numerous subject matters, but did not do so for costs associated with the discussion of these same subjects from a religious perspective. *See* 515 U.S. at 831. On these facts, the Court concluded that the university regulation discriminated on the basis of viewpoint. *See id.* As the Court explained, religion provides "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications." *Id.*

Likewise, in *Lamb's Chapel*, the Court held unconstitutional a school district's exclusion of a church from the use of the district's facilities. The school district permitted its facilities to be used for the discussion of subject matters like child rearing and family values. *See* 508 U.S. at 393. It prohibited the use of its facilities, however, for the presentation of films and lectures on the same subject matters when the "presentation [was] from a religious perspective." *Id.* at 393-94. The Court concluded that, because the films "no doubt dealt with a subject otherwise permissible" under the school district's policy (*i.e.*, the teaching of family values), the district's exclusion of the church from its limited public forum was unconstitutional viewpoint discrimination. *See id.* at 394.

Each of these cases confirmed the First Amendment's general prohibition on viewpoint discrimination, even when it occurs in limited public forums. While the line between subject matter and viewpoint is "not a precise one," *Rosenberger*, 515 U.S. at 831, these decisions make clear that "'[i]t discriminates on the basis of viewpoint to permit [a government forum] to be used for the presentation of all views about [a subject matter] except those dealing with the subject matter from a [particular] standpoint.'" *Id.* at 830 (quoting *Lamb's Chapel*, 508 U.S. at 393). The general principle emerging from these cases is that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a [particular] viewpoint." *Good News Club*, 533 U.S. at 112 (emphasis omitted).

As these cases suggest, "[v]iewpoint discrimination is . . . an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829. "When the government targets not subject matter, but particular views taken by speakers on

a subject, the violation of the First Amendment is all the more blatant." *Id.* The reason for the Court's careful scrutiny of such restrictions is that, unlike subject-matter restrictions, which may impoverish public debate by removing entire subjects from public discourse, viewpoint-based restrictions run the risk of affirmatively "skew[ing]" debate in the "marketplace of ideas." *Id.* at 831.

2. The court of appeals' decision threatens serious erosion of the First Amendment principle of viewpoint neutrality. Like the viewpoint-based restrictions in *Good News Club*, *Rosenberger*, and *Lamb's Chapel*, the rules governing Seattle's publication of voters' pamphlets are unconstitutional: Seattle has established a medium for speech in its voters' pamphlets, but the City censors candidate speech within the forum based on the speaker's perspective as an opponent. This prohibition is in clear derogation of this Court's precedents. *See Rosenberger*, 515 U.S. at 829 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion *or perspective* of the speaker is the rationale for the restriction.") (emphasis added).

The court of appeals perfunctorily cited *Lamb's Chapel* and its progeny, but then effectively ignored the holdings of those decisions. The court erroneously concluded that Seattle's prohibition merely "limits the *subject matter* of the forum to candidate self-discussion," and that Cogswell's proposed submission therefore "addressed a *subject matter* outside the limited forum." App. 10, 11 (emphases added). This Court has repeatedly rejected such attempts to semantically reclassify the scope of a limited public forum in subject-matter terms so as to mask viewpoint discrimination. In *Rosenberger*, for example, the

university maintained that its prohibition on reimbursement of religious activities was only a subject-matter limitation. *See* 515 U.S. at 830-31. The Court, however, scrutinized the university regulation more closely. Because the regulation did not exclude any subject entirely from the forum, but rather excluded speech on subject matters otherwise permitted within the forum when offered from a specific perspective, the Court concluded that the regulation discriminated on the basis of viewpoint. *See id.*; *see also Good News Club*, 533 U.S. at 106-09 (holding that, where the school forbade the discussion of certain subjects from a religious perspective, it unlawfully discriminated on the basis of viewpoint); *Lamb's Chapel*, 508 U.S. at 393-94 (same).[3]

This Court has rejected arguments similar to that relied on by the court of appeals here, and with good reason. The court of appeals blandly approved of viewpoint discrimination by simply recharacterizing the subject matter of Seattle's voters' pamphlets as limited to "candidate self-discussion." App. 10, 11, 16. This sets a dangerous precedent. A viewpoint-based restriction can virtually

[3] This Court's decision in *Boos v. Barry*, 485 U.S. 312 (1988), is not to the contrary. In *Boos*, the Court held unconstitutional under the First Amendment an ordinance prohibiting the display of a sign within 500 feet of a foreign embassy if the sign tended to bring the foreign government into public odium or disrepute. *See id.* at 321-29. One portion of Justice O'Connor's opinion that did not garner a majority rejected an argument that the display prohibition was "directly viewpoint-based." *Id.* at 319. That reasoning is called into question by the Court's subsequent decisions in the *Lamb's Chapel* line of cases and, significantly, no Supreme Court decision since *Boos* has rejected a claim of viewpoint discrimination on the basis of that portion of the *Boos* plurality opinion.

always be linguistically described in subject-matter terminology. In *Lamb's Chapel* and *Good News Club*, for example, the school district defendants could have recharacterized the viewpoint-based restrictions at issue instead as subject-matter limitations restricting the forums to *secular* events and activities "pertaining to the welfare of the community." *Lamb's Chapel*, 508 U.S. at 386; *Good News Club*, 533 U.S. at 108. In this manner, the defendants could have argued that the plaintiff religious groups' use of the facilities fell outside the permissible subject matter of the forum. If permitted, this type of semantic end-run could be used to save any speech prohibition from the rule against viewpoint discrimination, thereby rendering this Court's decisions in the *Lamb's Chapel* line of cases meaningless.

Seattle's prohibition excludes speech on subject matters that are otherwise permissible within the voters' pamphlet forum solely based on the perspective of the speaker. Seattle does not exclude the subject matter of candidate records from voters' pamphlets. Rather, the City has established a limited public forum precisely to allow voters to "hear from all of the candidates in their own words." Thus, while candidates' records, qualifications, and positions are permissible subjects for discussion in the voters' pamphlets, they are excluded when discussed from the perspective of an opposing candidate. Or, in the court of appeals' words, "[c]andidate criticism of an opponent" is forbidden. App. 10. Here, although Cogswell's opponent, the incumbent McIver, was able to tout his own record in his candidate statement, Cogswell was forbidden from offering his viewpoint on McIver's record. This is the distortion of the marketplace of ideas decried in *Rosenberger*. *See* 515 U.S. at 831-32. It is thus unsurprising that

the Court's definition of viewpoint discrimination in *Rosenberger* fits this case perfectly: Seattle's speech prohibition "discriminates on the basis of viewpoint" because it permits a "[government forum] to be used for the presentation of all views about [a subject matter] except those dealing with the subject matter from a [particular] standpoint." 515 U.S. at 830 (internal quotation marks and citation omitted). Seattle's prohibition on candidate reference to an opponent is viewpoint discrimination, pure and simple.[4]

Equally untenable is the Ninth Circuit's conclusion that Seattle's prohibition qualifies as a permissible subject-matter limitation because *all* candidates are prohibited from discussing their opponents. *See* App. 12. This Court has rejected the "two wrongs make a right" argument on at least two occasions. In *Rosenberger* the Court explained that the "declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways." 515 U.S. at 831-32. Similarly, in *Lamb's Chapel*, the Court recognized that the fact

[4] In *Clark v. Burleigh*, 841 P.2d 975, 988 (Cal. 1992), the California Supreme Court upheld a similar voters' pamphlet statute as viewpoint-neutral. However, the court summarily stated this conclusion with little supportive reasoning. The little analysis that *Clark* did provide is incorrect. The court rested its finding of viewpoint neutrality, in part, on the fact that there was no evidence that the California Legislature possessed a viewpoint-discriminatory motive in enacting the pamphlet statute. *See id.* But as *Good News Club*, *Rosenberger*, and *Lamb's Chapel* make clear, the state need not intend to suppress a specific viewpoint in order for a restriction to violate the First Amendment. These cases, all decided after *Clark*, call the continuing viability of the California Supreme Court's decision into question.

> [t]hat all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.

508 U.S. at 393. Rather than mitigating the affront to the First Amendment, Seattle's prohibition on *both* an incumbent's *and* a challenger's discussion of each other's records only multiplies the number of viewpoints hidden from voters. *See Rosenberger*, 515 U.S. at 831 ("It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.").

3. The court of appeals' abrupt departure from this Court's precedents is especially troublesome because it occurred in the context of an election for public office.

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (internal quotation marks and citations omitted); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates. . . . ").[5]

This Court recently reaffirmed the exalted place of political speech in the context of campaigns, noting that the "[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) (internal quotation marks and citation omitted). The Court in *White* rejected a canon of judicial conduct that prohibited candidates for judgeships from announcing their views on disputed issues, stating that "[w]e have never allowed the government to prohibit candidates from communicating relevant information to voters during an election." *Id.* Such speech prohibitions not only impair the speaker's right of expression, but also deprive voters of the free flow of public information. *See Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (noting that the First Amendment "embodies our trust in the free

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[5] *See also* James Madison, *Report on the Virginia Resolutions*, Feb. 7, 1777, *in* 6 *Writings of James Madison* 341 (Gaillard Hunt ed., 1906) ("[T]he right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.").

exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. . . . It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign.") (internal quotation marks and citation omitted); *cf. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (First Amendment protects both the right to speak and the right to hear).

4. The Court should review the court of appeals' decision not only because of the substantial impact it will have on political campaign speech, but also to bring clarity to the jurisprudence of viewpoint discrimination – and its hazy distinction from subject-matter limitations – in limited public forums. In *Rosenberger* the Court explained that "discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination," but acknowledged that "the distinction is not a precise one." 515 U.S. at 830-31. This imprecision has proved frustrating for the lower courts, which have struggled to apply the distinctions made in *Lamb's Chapel*, *Rosenberger*, and *Good News Club* to speech restrictions arising in different contexts. The lower courts will benefit from this Court's ruling in the context of important political speech.

The Seventh Circuit has expressly recognized the "inherent manipulability of the line between subject and viewpoint," and accordingly has called for careful scrutiny of *any* content-based discrimination. *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir. 1996); *see also id.* ("[T]he line between viewpoints and subjects is such an elusive one."). The Seventh Circuit noted the inherent danger to freedom of speech that arises

from failure to correctly police the line: "Because subject matter discrimination is clearly constitutional in nonpublic fora, classifying a particular viewpoint as a subject matter rather than as a viewpoint on a subject will justify discrimination against the viewpoint." *Id.* (citation and emphasis omitted).

In an earlier Seventh Circuit case, *Air Line Pilots Association International v. Department of Aviation*, 45 F.3d 1144 (7th Cir. 1995), plaintiffs maintained that Chicago's exclusion of their advertisement from an airport display case discriminated on the basis of the viewpoint expressed in the advertisement. In remanding the case to the district court, the Seventh Circuit clarified that the inquiry into potential viewpoint discrimination should not end once a court can identify some general subject matter excluded from the forum that includes the allegedly suppressed viewpoint. "The district court held that because all 'political' advertisements had been barred, no viewpoint discrimination existed. This determination effectively avoided viewpoint inquiry by retreating to an exaggerated level of generality." *Id.* at 1159. Citing *Lamb's Chapel*, the Seventh Circuit explained that "[t]he appropriate focus . . . examines whether the proposed speech dealt with a subject that was *otherwise permissible* in a given forum." *Id.* (internal quotation marks and citation omitted) (emphasis added). The Seventh Circuit provided specific guidance to the district court on remand:

> [I]n a future viewpoint inquiry . . . the district court should not retreat into broader categories of speech with some imagined or hypothetical meaning. Instead, the proper focus concerns whether or not the forum has included speech on the same general subject matter. If this is the

> case, then suppression of a proposed but distinct view because of some content element included in it is impermissible.

Id. at 1160.

Given the Seventh Circuit's wariness for the "inherent manipulability of the line between subject and viewpoint," *Grossbaum*, 100 F.3d at 1298, Cogswell's case might well have been decided differently had it been litigated in the Seventh Circuit. In Cogswell's case, the court of appeals acknowledged that Seattle had opened a forum for candidates to "discuss themselves, their qualifications and their backgrounds." App. 11. These subjects were thus, in the words of the Seventh Circuit, "otherwise permissible in [the] given forum." *Air Line Pilots*, 45 F.3d at 1159 (internal quotation marks and citation omitted). But the Ninth Circuit labeled Cogswell's speech as the supposedly distinct subject matter of "criticism" instead of recognizing it as a viewpoint on the same subject matters discussed by his opponent.

The Eleventh Circuit has also recognized "the malleability of the distinction between content discrimination, which is permissible [in a limited public forum], and viewpoint discrimination, which is not." *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1549 (11th Cir. 1997). The court has strictly applied the Supreme Court's understanding of viewpoint discrimination as expressed in the *Lamb's Chapel* line of cases. *See id.* ("Viewpoint discrimination, however, is impermissible 'when directed against speech that is otherwise within the forum's limitations.'" (quoting *Rosenberger*, 515 U.S. at 830)). As the Eleventh Circuit explained in a concrete hypothetical, "a university might limit the funds it makes available for student activities to those involving Shakespearean

literature. Within such a framework, however, the university could not deny funding to *critical interpretations* of Shakespeare." *Id.* (emphasis added). As noted above, the Ninth Circuit treated "criticism" as if it were a separate subject matter. Given the Eleventh Circuit's understanding of viewpoint discrimination, it is doubtful the Seattle speech prohibition would have survived a challenge in that circuit, offering further testament to the lack of clarity between impermissible viewpoint and permissible subject-matter discrimination in the federal courts.

Other courts have also noted the imprecision in the rules distinguishing between content and viewpoint discrimination. *See Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 623 (4th Cir. 2002) ("Viewpoint discrimination is a kind of content discrimination, but is not always easily distinguishable."); *id.* at 623 n.11 ("As the Ninth Circuit has noted, the coherence of the distinction between content discrimination and viewpoint discrimination may be seen as tenuous." (internal quotation marks and citation omitted)); *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 281 (2d Cir. 1997) (describing Supreme Court's line between content and viewpoint discrimination as a "concededly imprecise distinction"); *Martin v. Vermont*, 819 A.2d 742, 758-59 (Vt. 2003) (Johnson, J., dissenting) ("[T]he distinction between content and viewpoint discrimination 'is not a precise one' [and t]his imprecision makes for unclear law, inconsistent decisions, and . . . creates uncertainty about the constitutionality of government programs. . . . The term 'viewpoint neutral' is probably a source of more confusion than clarity in judicial decisions." (citation omitted)).

Moreover, the Ninth Circuit has itself often articulated the difficulty that courts have policing the line between permissible subject-matter limitations and unconstitutional viewpoint discrimination. Three years ago, in *Giebel v. Sylvester*, 244 F.3d 1182, 1188 n.10 (9th Cir. 2001), the Ninth Circuit openly questioned "[w]hether or not the content-viewpoint distinction can withstand rigorous scrutiny." There, the court considered whether a university professor's removal of his colleague's handbills from bulletin boards constituted viewpoint discrimination within the meaning of this Court's limited public forum jurisprudence. *See id.* at 1185. Noting initially that "it [was] not altogether clear whether [the defendant's] alleged suppression of [his colleague's] speech should be classified as content-based or viewpoint-based," the court ultimately held that it was "most appropriately treated" as the latter. *Id.* at 1188. The court explained in detail, however, the basis for confusion in this area of First Amendment jurisprudence:

> The coherence of the distinction between "content discrimination" and "viewpoint discrimination" is tenuous. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1751 & n.155 (1987). While the former describes the subject matter of speech, and the latter the specific positions taken on the matter, *id.*, the level at which "subject matter" is defined can control whether discrimination is held to be on the basis of content or viewpoint. For example, should a library's decision to exclude all books concerning astrology be treated as content discrimination, because astrology is a subject matter about which astrologers (and others) may

> have different views, and the library has excluded all discussion of that subject matter? Or should such a policy be treated as viewpoint discrimination because with respect to the subject matter of the study of the heavens, the library affords preferential treatment to the science of astronomy and bans the study of astrology?

Id. at 1188 n.10.

The Ninth Circuit again struggled with this classification question in *Sammartano v. First Judicial District Court*, 303 F.3d 959 (9th Cir. 2002). There, the issue was whether the government's exclusion from a courthouse of persons wearing clothing with motorcycle organization symbols drew "lines of inclusion and exclusion based on the larger (and permitted) category of 'subject matter' or the smaller (and forbidden) subcategory of 'viewpoint.'" *Id.* at 970. As it had in *Giebel*, the court noted the difficulty of drawing such lines:

> We freely admit that the Supreme Court's concept of viewpoint neutrality in First Amendment jurisprudence has not been easy to understand. As one commentator has put it, the concept has been "confusing in both definition and application, and has been selectively applied in many contexts." Marjorie Heins, *Viewpoint Discrimination*, 24 Hastings Const. L.Q. 99, 103 (1996). The difficulty largely results from an elusive distinction drawn in the caselaw between discrimination on the basis of subject matter and discrimination on the basis of viewpoint.

Id. Because of the intangible nature of this "elusive distinction," the court explained that judges "must be wary of attempts to manipulate the line between subject and viewpoint by claiming that a regulation operates at a

higher (and more appropriate) level of generality than it actually does." *Id.* at 971. In *Sammartano*, the court ultimately resolved the question in favor of the plaintiffs, but not by resort to any concrete, easily applied rules. *See id.*

This case presents the Court with a good opportunity to bring needed clarity and concrete guidance to limited public forum jurisprudence. This petition presents a focused question for review: whether, for purposes of the First Amendment, a specific speech prohibition is permissible subject-matter limitation or unconstitutional viewpoint discrimination. This case is an ideal one for the Court to clarify the proper method for answering this question. Unlike the district court, the court of appeals did not consider the core purposes of the First Amendment – such as the paramount value of electioneering speech – when placing the Seattle candidate speech prohibition in one box rather than the other. It is thus a stark example of how the distinction between content-based and viewpoint-based restrictions will become incoherent if not grounded in first principles. Review by this Court will provide much-needed guidance to the lower courts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRANT T. COGSWELL,
Plaintiff-Appellee,

v.

CITY OF SEATTLE; CITY OF SEATTLE ETHICS AND ELECTIONS COMMISSION,
Defendants-Appellants.

No. 01-36162

D.C. No.
CV 01-1209 RSL
OPINION

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted
July 10, 2003 – Seattle, Washington

Filed October 27, 2003

Before: Thomas M. Reavley,* A. Wallace Tashima, and Richard A. Paez, Circuit Judges.

Opinion by Judge Tashima

COUNSEL

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* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

OPINION

TASHIMA, Circuit Judge:

The City of Seattle and the City of Seattle Ethics and Elections Commission (together, "Seattle") appeal the district court's grant of summary judgment in favor of plaintiff Grant T. Cogswell ("Cogswell"). Evaluating Seattle Municipal Code 2.14.060(C), which prohibits references to political opponents in candidate statements included in Seattle voters' pamphlets, under the reasonableness standard applied to limited public fora, the district court held that the restriction, although reasonable, was unconstitutionally viewpoint discriminatory. We have jurisdiction over Seattle's timely appeal under 28 U.S.C. § 1291, and we reverse.

BACKGROUND

I. The Restriction

The Revised Code of Washington § 29.81A.010 authorizes the publication of a voters' pamphlet in local elections as a "voter education resource." In order to offer a voters' pamphlet, a city must adopt an ordinance governing the publication of the voters' pamphlet, as well as the administrative rules necessary to carry out the ordinance.[1] Section 29.81A.030(3) provides that "[a]ny statements by a candidate shall be limited to those about the candidate himself or herself."

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[1] Local administrative rules must cover certain provisions, such as limits on the length of candidate statements, deadlines for the inclusion of candidate statements in the pamphlet, and appropriate bases for rejection of a candidate statement. Wash. Rev. Code §§ 29.81A.010-.030.

Pursuant to state law, the Seattle City Council enacted Seattle Municipal Code ("SMC") 2.14.060 to govern candidates' statements in Seattle voters' pamphlets.[2] Seattle also adopted the Seattle Ethics and Election Commission Voters' Pamphlet Rules to govern the publication of the voters' pamphlet (and a similar Video Voter' Guide). In compliance with Washington law, the ordinance and its accompanying rules provide that "[a] candidate's campaign statement shall not discuss the opponent." SMC 2.14.060(C).

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[2] SMC 2.14.060 provides:

A. To participate in the election pamphlet, a candidate shall file with the Executive Director (1) a photograph taken within the past two (2) years and (2) a campaign statement. The filing shall be in the form and within the deadlines established by the rules promulgated pursuant to Section 2.14.100. The candidate may also submit an address, phone, e-mail address, and web address for publication in the election pamphlet that the public may use in communicating with the candidate or the candidate's political committee.

B. The photograph shall show the candidate's face, or face, neck and shoulders in the manner of a portrait. It shall exclude other images, such as the candidate's hands, anything held in the candidate's hands, or other people. The candidate shall not wear a uniform or hat or bear an insignia. The background shall be plain. The photograph shall be of a size or quality suitable for reproduction. Informal snapshots, cartoons, caricatures, or images that do not accurately portray the candidate shall be rejected.

C. The candidate's statement shall not exceed four hundred (400) words. No obscene, profane, libelous or defamatory matter, or language, which may impair circulation of the pamphlet through the mail, shall be accepted. A candidate's campaign statement shall not discuss the opponent.

II. Factual Background

Cogswell has been involved in local and regional transportation issues for many years, and has authored numerous initiatives to improve public transportation in the Seattle area. Largely as a result of his participation and experience in transportation issues and his desire to effectuate positive change in this area, Cogswell registered as a candidate for the Seattle City Council in the 2001 primary elections. Cogswell registered for the seat occupied by Richard McIver, chair of the Council's Transportation Committee, and ran to challenge McIver's record on transportation. McIver ran for reelection based on his record as a City Council member.

On July 30, 2001, Cogswell submitted a candidate statement for inclusion in the voters' pamphlet. Citing the restriction prohibiting candidates from referring to their opponents in statements to be included in the voters' pamphlet and video voters' guide, Seattle rejected Cogswell's candidate statement because it discussed his opponent. The portion of Cogswell's statement discussing his opponent reads:

> Sound Transit refuses to consider Monorail even though Seattle voted for it twice. The incumbent, Council member McIver, was originally appointed – not elected – to his seat on the city council in 1996. Since taking office, McIver has served as a key board member and lobbied against grants for Monorail from that agency; voted for legislation that repealed the first Monorail Initiative; hesitated to stand against the forces on regional committees who want more lanes on SR 520, and is failing to pursue sensible public transportation solutions for the city and the region.

Seattle allowed Cogswell to publish a revised statement in the voters' pamphlet that did not contain discussion of his opponent. Under protest, Cogswell also taped a revised version of his video statement to be included in the video voters' guide.

Cogswell filed this action in the district court on August 7, 2001, seeking a preliminary and permanent injunction allowing publication of his candidate statement containing references to his opponent in the voters' pamphlet for the 2001 Seattle local elections. The Seattle local election occurred in November of 2001.[3]

III. Procedural Background

Cogswell brought suit under 42 U.S.C. § 1983 alleging that Wash. Rev. Code §§ 29.81A.010 and 29.81A.030(3), and SMC 2.14.060(C) unconstitutionally deprived him of his free speech rights under both the First Amendment of the United States Constitution and Article I, section 5, of the Washington Constitution. The action was brought as a facial challenge to Seattle's restriction as a viewpoint

[3] Under *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000), this case is not moot because it falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. "Although the election has passed, [Cogswell's] claim is capable of repetition because in the future [Seattle] would deny him, or any other [candidate, the right to discuss an opponent in a candidate statement included in the Seattle voters' pamphlet.]" *Id.* "The short span of time between the filing deadline [for the candidate statement] and the election makes such a challenge evasive of review." *Id.* "When [a] case is 'capable of repetition, yet evading review,' . . . the fact that the court cannot give [Cogswell] the full relief he sought will not render the case moot." *Id.*

biased and unreasonable limitation on Cogswell's free speech rights in a limited public forum.

The district court denied Cogswell's motion for preliminary injunction to compel publication of an uncensored version of his candidate statement, filed with his complaint on August 7, 2001. At oral argument, Cogswell withdrew his challenge to the constitutionality of Wash. Rev. Code §§ 29.81A.010 and 29.81A.030(3), leaving only his challenge to the constitutionality of SMC 2.14.060(C).

On September 19, 2001, the district court granted Cogswell's motion for summary judgement, holding SMC 2.14.060(C) unconstitutional. The district court recognized the reasonableness of the restriction, but nevertheless found SMC 2.14.060(C) viewpoint discriminatory, as it limited the speech of candidates based on their viewpoints as opponents. Seattle timely appealed.

STANDARD OF REVIEW

"A district court's determinations on questions of law and on mixed questions of law and fact that implicate constitutional rights are [] reviewed de novo." *Dittman v. Cal.*, 191 F.3d 1020, 1025 (9th Cir. 1999). A district court decision granting summary judgment is also reviewed de novo. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). We must determine, viewing the evidence in the light most favorable to the nonmoving party, "whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

"In order to prevail on this facial challenge to the [restriction], [Cogswell] must meet a high burden of proof; [he] must 'establish that no set of circumstances exists under which the [restriction] would be valid. The fact that the [restriction] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.'" *S.D. Myers, Inc. v. City & County of San Francisco,* 253 F.3d 461, 467 (9th Cir. 2001) (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987)).

ANALYSIS

I. LAW APPLICABLE TO A LIMITED PUBLIC FORUM

The parties agree that the voters' guide constitutes a limited public forum and we accept the parties' classification of the type of forum involved. *See Kaplan v. County of Los Angeles,* 894 F.2d 1076, 1080 (9th Cir. 1990) (holding that California voters' pamphlet constitutes a limited public forum because "California created the pamphlets for the specific purpose of allowing a limited class of speakers, the candidates, to address a particular class of topics, statements concerning the personal background and qualifications of each candidate"). "[A] limited public forum is a sub-category of a designated public forum that 'refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.'" *Hopper v. City of Pasco,* 241 F.3d 1067, 1074 (9th Cir. 2001) (quoting *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.,* 196 F.3d 958, 965 (9th Cir. 1999)) (alteration in original).

In limited public fora, a lenient reasonableness standard applies to determine the validity of governmental regulations. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1980); *Hopper*, 241 F.3d at 1074. Under this reasonableness test, the State can restrict access to a limited public forum as long as (1) the restriction does not discriminate according to the viewpoint of the speaker, and (2) the restriction is reasonable. *Perry*, 460 U.S. at 46. *See also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Cornelius*, 473 U.S. at 806.

II. THE RESTRICTION IS NOT VIEWPOINT DISCRIMINATORY

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828 (citing *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972)). "The principle that has emerged from [Supreme Court] cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

Thus, "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829 (holding that the University of

Virginia's denial of funding to a student newspaper because of its Christian editorial viewpoints where the school funded other editorial viewpoints was viewpoint discriminatory).

In order to preserve the limits of a limited public forum, however, the State may legitimately exclude speech based on subject matter where the subject matter is outside the designated scope of the forum. *Good News Club,* 533 U.S. at 109; *Rosenberger,* 515 U.S. at 829-30; *Lamb's Chapel,* 508 U.S. at 394; *Cornelius,* 473 U.S. at 806. "The necessities of confining a [limited public] forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger,* 515 U.S. at 829. *See also Perry,* 460 U.S. at 49.

The line between an acceptable subject matter limitation and unconstitutional viewpoint discrimination is not a bright one. To determine if a restriction on speech in a limited public forum is viewpoint discriminatory, we apply the guidelines established by the *Lamb's Chapel* line of cases. *See Good News Club,* 533 U.S. at 109; *Rosenberger,* 515 U.S. at 829-30; *Lamb's Chapel,* 508 U.S. at 394. The issue of the restriction's viewpoint neutrality therefore turns on the nature of the forum in relation to the subject matter limitation – if the speech at issue does not fall within an acceptable subject matter otherwise included in the forum, the State may legitimately exclude it from the forum it has created. However, if the speech does fall within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker.

Cogswell argues that the restriction is viewpoint biased because it does not exclude the entire subject matter of a candidate's record, but only excludes speech on a candidate's record from the specific perspective of an opponent. Cogswell supports his viewpoint discrimination argument by comparing Seattle's restriction to the *Lamb's Chapel* cases where the government has excluded religious viewpoints from limited public fora. These cases emphasize that once the government has chosen to permit discussion of certain subject matters, it may not then silence speakers who address those subject matters from a particular perspective. *See Good News Club,* 533 U.S. at 109; *Rosenberger,* 515 U.S. at 829-30; *Lamb's Chapel,* 508 U.S. at 394. Cogswell claims that the restriction here violates that rule because candidates in Seattle are permitted to discuss their "views, historical actions and future plans," but their opponents are prohibited from presenting opposing views on the same subjects. The district court found this argument persuasive. We do not. The restriction acceptably limits the subject matter of the forum to candidate self-discussion. Candidate criticism of an opponent is not included within the subject matter of Seattle's limited public forum. Viewed in this light, Cogswell's submission discussed matters outside the scope of the limited public forum and, therefore, could properly be rejected.

In *Good News Club,* the Supreme Court found a public school's exclusion of a Christian club from meeting on its grounds viewpoint discriminatory because the school permitted non-religious groups "pertaining to the welfare of the community" to meet at the school. 533 U.S. at 107-08. "Like the church in *Lamb's Chapel,* the [Good News] Club [sought] to address a subject otherwise permitted [in

the school's limited public forum], the teaching of morals and character, from a religious standpoint." *Id.* at 109. As the Good News Club used a religious viewpoint to address the subject matter of the forum, exclusion of the group from the forum simply because of that viewpoint constituted prohibited viewpoint discrimination. *Id.*

In contrast to *Good News Club,* the subject Cogswell wishes to address, his opponent's record, is not otherwise permitted in the limited public forum of Seattle's voters' pamphlet. Seattle has opened the forum to candidates running for office to discuss one topic – themselves. The restriction limits the subject matter allowed in the voter's pamphlet to this topic. In their candidate statements, candidates may discuss themselves, their qualifications and their backgrounds. The subject matter permitted in Seattle's forum is not a free-for-all discussion of every candidate's qualifications, or an opportunity for candidates to engage in mudslinging. Because Seattle has not restricted viewpoints on candidate self-discussion, the subject matter included in the forum, *Good News Club, Rosenberger*, and *Lamb's Chapel* do not invalidate the restriction. Seattle appropriately excluded Cogswell's statement from the voters' pamphlet because he addressed a subject matter outside the limited forum.

Our reading of the restriction is also supported by the enabling statute, the text of SMC 2.14.060, and Seattle's implementation of the restriction. "In evaluating [Cogswell's] facial challenge, we must consider [Seattle's] authoritative constructions of the ordinance, including its own implementation and interpretation of it." *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 131 (1992).

Washington law has shaped the limited nature of the forum by requiring that the city establish rules restricting candidates' statements to "statements . . . about the candidate himself or herself." Wash. Rev. Code § 29.81A.030. Based on the Washington governing statute, Seattle's restriction further tailors the limits of the forum to the appropriate subject matter for Seattle's voters' pamphlet.

On its face, the text of the restriction in SMC 2.14.060(C), "a candidate's statement shall not discuss its opponent," also shapes the limited forum of the voters' pamphlet, and confirms that the purpose of the restriction is to provide a forum for candidates to talk about themselves, and not about their opponents.

Regarding the implementation of its restriction, Seattle persuasively argues "the candidate statement Cogswell challenges is, and always has been, a subject matter ground rule of the forum, entirely consistent with the purpose for which the forum was created." Indeed, such a ground rule cannot form the basis of a viewpoint discrimination claim absent evidence that the government is intending to "suppress expression merely because public officials oppose the speaker's view." *Perry,* 460 U.S. at 46. There is no evidence that Seattle opposes Cogswell's views on McIver. Instead, the restriction exists as a method of regulating the limited public forum of the voters' pamphlets, and is equally applicable to all candidates. Because the nature of Seattle's forum is limited to candidate's discussions of their own records, submissions that discuss an opponent are not within the scope of the forum and can be excluded. *Good News Club,* 533 U.S. at 109.

We therefore conclude that the limited forum does not encompass the subject matter at issue – candidates' statements that discuss their opponents. Cogswell's statement is thus not included in the forum's limited subject matter.

III. THE RESTRICTION IS REASONABLE AND DOES NOT VIOLATE THE CONSTITUTION

In a limited public forum, a restriction on speech violates the First Amendment if it is unreasonable. *Perry,* 460 U.S. at 46. The reasonableness of a governmental restriction limiting access to a nonpublic forum must be assessed "in light of the purpose of the forum and all of the surrounding circumstances." *Cornelius,* 473 U.S. at 789. The reasonableness analysis emphasizes the consistency of the limitation in the context of the forum's intended purpose. *Di Loreto,* 196 F.3d at 967. The district court correctly determined that the restriction is reasonable in light of the purpose of the forum. Seattle intended the limited public forum of the candidate statement only to *introduce* candidates to the voters and provide brief biographical information, as opposed to providing a forum for extensive campaigning.

Cogswell argues that the restriction is unreasonable because (1) Seattle's enforcement of the restriction does not mesh with the asserted purpose of the forum as Seattle has allowed candidates to discuss everything but their opponents in candidate statements, and (2) the

restriction is an "illegitimate" form of governmental censorship on political speech.[4]

However, the government has substantial leeway in determining the boundaries of limited public fora it creates. The restriction is reasonable for several reasons. First, "[t]he Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable limitation or the only reasonable limitation on speech [in that forum.]" *Cornelius*, 473 U.S. at 808. Simply because Cogswell or other candidates may feel that there are other more reasonable ways to regulate the voters' pamphlet does not render this restriction unreasonable. Second, there is no requirement that a restriction in a limited public forum be narrowly tailored or the government's interest be compelling for a restriction

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[4] Cogswell also argues that the restriction is unreasonable because it "re-casts a condition" of the restriction as the purpose of the forum, citing *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001). In *Legal Services Corp.*, the Court held that if conditions of governmental regulations were recast as purposes of those regulations every time controversy arose, the "First Amendment [would] be reduced to a simple semantic exercise." *Id.*

Every indication, however, is that Seattle intended the limited purpose of the forum at the ordinance's inception. State law stipulated that the local voter's guide serve the purpose of a "voter education resource" on the basic biographical information of candidates. Likewise, in their 1999 voters' pamphlet Seattle stated that the pamphlet existed to "assist [voters] in making informed choices for the city positions and propositions that appear on the . . . ballot." Seattle did not intend the forum to take the place of the campaigning process, but to augment the candidates' campaigns by providing a brief synopsis of each candidate to the voters. Seattle did not "recast" the purpose of the forum, in light of the controversy here, because it always intended the forum to be a limited method for candidates to discuss themselves when it enacted the restriction.

to be reasonable. *Id.* at 809. In this limited public forum, Seattle need only justify the restriction "in light of its intended purpose," which it clearly does. Seattle intended its voters' pamphlet to introduce the candidates to the voters, and the restriction helps further this purpose by limiting candidate statements to self-discussion.

Cogswell also argues that the restriction is unreasonable because it is illegitimate governmental censorship of political speech. In *Cornelius,* however, the Supreme Court held that "a non-public forum by definition is not dedicated to general debate or the free exchange of ideas." 473 U.S. at 811. The existence of alternative channels of communication outside the forum allow political candidates to communicate information restricted by the purposes of the forum, providing other means of contact and communication with the intended audience. *Perry,* 460 U.S. at 53-54. Because limited public fora are a type of non-public forum, *see Hopper,* 241 F.3d at 1074, Seattle is not required to allow the free exchange of ideas in the voters' pamphlet, and can restrict the content of the pamphlet as necessary to meet the purpose for which it created the forum. Cogswell and other candidates have not been unreasonably censored because they have other forums for campaigning where they are able to communicate material limited by the restriction on this forum. *Perry,* 460 U.S. at 53-54.

Because the purpose of the forum is for candidates to discuss themselves, we hold that the restriction is reasonable. There is no requirement that a governmental regulation of a limited public forum be the "most reasonable" or the "only reasonable" limitation on the forum. *Cornelius,* 473 U.S. at 808. Alternative fora outside the limited public forum of the voters' pamphlet allow Cogswell and other

candidates to comment, *ad infinitum,* on the weaknesses of their opponents and other ideas central to political speech. Therefore, viewing the restriction in light of the purpose of the forum and its surrounding circumstances, we conclude that the restriction is reasonable.

CONCLUSION

The restriction in SMC 2.14.060(C), that a candidate's statement "shall not discuss the opponent," is not unconstitutionally viewpoint biased because Seattle has legitimately preserved the parameters of its voters' pamphlet by limiting the subject matter included in the forum to candidate self-discussion. The restriction is reasonable because it furthers the purpose for which Seattle created the forum. The judgment of the district court is therefore **REVERSED and REMANDED** with directions to enter judgment in favor of Seattle.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GRANT T. COGSWELL, Plaintiff, v. CITY OF SEATTLE and CITY OF SEATTLE ETHICS AND ELECTIONS COMMISSION, Defendants.	No. C01-1209L ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Filed Sep. 19, 2001)

On August 7, 2001, plaintiff filed a motion for preliminary injunction to compel the City of Seattle and its Ethics and Elections Commission to publish an uncensored version of his candidate statement in the voters' pamphlet that was issued in connection with the September 18, 2001, primary election. The Court denied the motion for preliminary relief, finding that, in light of the nature of the forum provided by the voters' pamphlet[1] and prior judicial rulings in similar factual contexts,[2] plaintiff's likelihood of success on the merits was doubtful. The Court further found that the public's interest would not be served by allowing Mr. Cogswell to criticize his opponent

[1] *See Hopper v. City of Pasco*, 241 F.3d 1067, 1074-75 (9th Cir. 2001); *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1080 (9th Cir. 1990).

[2] *See Clark v. Burleigh*, 841 P.2d 975 (Cal. 1992); *Baker v. Pierce County*, C97-5527 RJB (W.D. Wash. September 29, 1997).

when all the other candidates were required to comply with the City's ordinance.

The constitutional issues raised in this litigation are again before the Court on plaintiff's motion for summary judgment. The parties have fully briefed the issues on a schedule designed to obtain a ruling before the candidates must submit their statements for inclusion in the general election voters' pamphlet. Both sides of this debate are to be commended for their high quality submissions, their obvious mastery of the constitutional issues, and their outstanding oral presentations.

In 1985, the City of Seattle accepted the state's invitation to publish and distribute a voters' pamphlet.[3] Pursuant to state law, the pamphlets may include "information on candidates," but any statements submitted by the candidate must "be limited to those about the candidate himself or herself." RCW 29.81A.010 and 29.81A.030(3). The City's related ordinance specifically provides that "[a] candidate's campaign statement shall not discuss the opponent." SMC 2.14.060. Plaintiff argues that the City's restriction on the content of his candidate statement violates the federal and state constitutional guarantees of freedom of speech.[4]

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[3] Plaintiff has also challenged the constitutionality of the City's restriction on reference to one's opponent in the video voters' guide statements, as set forth in Rule 3.5 of the 2001 Video Voters' Guide Rules for Participation. The parties agree that the restrictions are similar for purposes of the following constitutional analysis.

[4] At oral argument, plaintiff withdrew his challenge to the constitutionality of RCW 29.81A.010 and 29.81A.030(3), arguing that the state law provisions are susceptible to an interpretation which

(Continued on following page)

The Court does not take limitations on speech lightly, and it recognizes that the constitutional guarantee of free speech has its "fullest and most urgent application" in the political arena. *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 266, 271-72 (1971)). Nevertheless, there are certain types of speech and certain fora in which, under the Supreme Court's jurisprudence, speech may be regulated and limited by the government without violating the First Amendment. The parties agree that the voters' pamphlet at issue in this litigation is a limited public forum, meaning that the government has created the forum for certain groups and/or has opened up the forum for the discussion of certain topics. *See Hopper v. City of Pasco*, 241 F.3d 1067,

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complies with the Constitution. The Court agrees. The state law requirement that statements be "about the candidate himself or herself" is broader than the City's ordinance which prohibits all references to one's opponent. While the state law clearly prohibits candidates from advertising their businesses, ranting against he policies of the United Nations, or otherwise discussing topics unrelated to their candidacy, it can and should be read to allow the presentation of all information about the candidate and his candidacy, even if a proper introduction would require mention of an opponent. Plaintiff's candidacy highlights the differences between the state and local restrictions. Whereas the City rejected plaintiff's statement simply because it referred to the incumbent, the statements' obvious focus on Mr. Cogswell, the reasons behind his decision to run for office, and his positions on various issues would satisfy the requirements of the state law. Nor is Mr. Cogswell's situation unique. A candidate who believes the long tenure of an incumbent justifies his removal from office (as in the 1994 Congressional race between George Nethercutt and then-Speaker Thomas Foley) or a candidate who believes the incumbent should be held accountable for reneging on a promise to serve only three terms (as occurred in Representative Nethercutt's 2000 campaign) needs to make such a reference to explain why the candidate himself or herself is mounting the campaign.

1074 (9th Cir. 2001). Restrictions on speech are permissible in limited public fora as long as the restriction (1) is reasonable in light of the purpose for which the forum was created and (2) does not discriminate on the basis of viewpoint. *See Good News Club v. Milford Central Sch.*, ___ U.S. ___, 121 S.Ct. 2093, 2100 (2001).

The Court finds, as it did in the preliminary injunction context, that the prohibition on statements about a candidate's opponent is reasonable in light of the purpose for which the City created this limited public forum. The preponderance of evidence before the Court supports the conclusion that the City created this forum so that a particular class of persons, namely candidates for political office, can distribute information on a very limited range of topics, namely the candidates' basic biographical and philosophical information. The pamphlets were never intended to provide an open-ended campaign tool or to replace public speechmaking and campaigning. They are, after all, a limited forum, both in purpose and in scope. Plaintiff's objections must fail in the context of a First Amendment challenge where the forum is intended only to introduce candidates to the voters, not to generate a stand-alone reference source or to level the electoral playing field. Precluding candidates from mentioning their opponents is a reasonable attempt to focus the candidates on providing the sort of basic introductory information the forum was created to elicit.

Whether the City's restriction constitutes viewpoint discrimination is a very close question which, in the preliminary injunction context, the Court was not convinced would go plaintiff's way. Having now had the benefit of the parties' further briefing, and having had additional time in which to consider the factually similar

cases on which the City relies,[5] the Court finds that the restriction on speech imposed by SMC 2.14.060 impermissibly discriminates based on viewpoint. Although the Supreme Court precedent has no been entirely consistent over the years (*see, e.g., Boos v. Barry*, 485 U.S. 312, 318-20 (1988)),[6] the issue of viewpoint discrimination was brought to the forefront in 1993 when the Supreme Court decided *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The rule established by *Lamb's Chapel* and two subsequent Supreme Court decisions[7] is clear: restrictions on speech which curtail only one side of an issue or one viewpoint on an otherwise acceptable subject constitute prohibited viewpoint discrimination. *Lamb's Chapel*, 508 U.S. at 394 ("[a]lthough a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers

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[5] *See Clark v. Burleigh*, 841 P.2d 975 (Cal. 1992); *Baker v. Pierce County*, C97-5527 RJB (W.D. Wash. September 29, 1997). Both of these cases conclude, in almost summary fashion, that restrictions like the one at issue here are viewpoint neutral.

[6] *Boos*, which involved a restriction on critical speech in a public forum, provides little guidance on the issue of viewpoint discrimination. Justice O'Connor's opinion, which strongly favors the City's position, was joined by only two other justices. The ruling of the concurring justices on the critical issue of viewpoint discrimination is not al all clear in light of Justice Rehnquist's general reliance on Judge Bork's appellate decision, which relied on the dubious assumption that content-based and viewpoint-based discrimination should be treated the same under constitutional law. *See Finzer v. Barry*, 798 F.2d 1450, 1469 (D.C. Cir. 1986).

[7] *See Good News Club v. Milford Cent. Sch.*, ___ U.S. ___, 121 S.Ct. 2093 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.") (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)). In the case at hand, one participant in the limited public forum, namely the incumbent, is permitted to discuss the incumbent's voting record, the projects he's supported, and his successes as an elected official. All of those topics are permissible in the forum, but only from the viewpoint of the incumbent. All other individuals who are admitted to the forum, namely all of the challengers, are precluded from offering their views on those very same topics.[8]

As is the case here, the viewpoints excluded in *Lamb's Chapel* were of varying kinds and on varying topics. The government entity involved had no animus toward any particular statement or opinion: rather, it simply wanted to silence all religious viewpoints on all topics, regardless of whether the speech reflected a Muslim, Christian, Jewish, or Hindu perspective. In keeping with *Lamb's Chapel* and contrary to the City's argument, plaintiff need not show that the City was intentionally discriminating against his statement, opinions, or views. It is enough to show that, on topics that were otherwise permissible in the forum, he was precluded from entering the debate only

[8] Of course, there will be times when the incumbent will want to make his opponent's lack of qualifications or record in another elective position the thrust of his candidate statement. Here, too, the City ordinance stifles an alternative viewpoint.

because he was critical and spoke from a particular perspective, namely that of a challenger.

Such restrictions, which silence one perspective or viewpoint on topics that are otherwise included in the forum, may lead to the most egregious affronts to the freedoms we hold dear. Freedom of speech is a fundamental right in this country because of the traditional belief that such freedom is essential to our democratic ideals, not only because it facilitates intelligent self-government, but also because the free exchange of ideas is the best method by which to arrive at the truth. *See, e.g.*, Michael Kent Curtis, *Free Speech. "The People's Darling Privilege"* 419 (2000) ("The popular tradition insisted that truth was more likely to emerge if the government did not have broad powers to suppress ideas and opinions. So the right to free speech protected ideas that were wrong as well as those that were virtuous, those that were foolish as well as those that were wise."). While any restriction on speech threatens the purposes for which the First Amendment was created, viewpoint-based restrictions are of the greatest concern. Subject-matter restrictions simply remove entire topics of debate from public discourse and public notice. Restrictions on viewpoint, however, affirmatively skew the debate by allowing only one side, or one viewpoint, to be presented to the populace. *See, e.g.*, *Rosenberger*, 515 U.S. at 831-32; Geoffrey R. Stone, *Restrictions of Speech Because of Its Content*, 46 U. Chi. L. Rev. 81, 108 (1978). In the circumstances of this case, allowing the incumbent to talk about his record and achievements while denying plaintiff the opportunity to talk about those same topics provides the public with only one side of a debatable subject and deprives plaintiff of a fair opportunity to present himself and his candidacy to

the voters. The City's ordinance, is, therefore, viewpoint discriminatory and unconstitutional.

The Court recognizes that this ruling adds an entirely new and unexpected level of complexity to the Elections Commission's job when reviewing candidate statements. The bright line rule which allowed the acceptance or rejection of a proposed statement based on the words chosen by the candidate can no longer be used and the Commission must either redefine its review criteria or give up its noble attempt to assist the voters through publication of the voters' pamphlet. With the benefit of the guidance provided in footnote 4, the Court is confident that Ms. VanNoy and her colleagues will meet their constitutional obligations in both the short- and long-run while still offering this valuable public service to the citizens of Seattle.

For all of the foregoing reasons, the Court finds that, although the City's restriction on statements about one's opponent in the voters' pamphlet and the video voters' guide is reasonable in light of the limited purposes of the fora, the restriction discriminates based on viewpoint in violation of the First Amendment of the United States Constitution. Plaintiff's motion for summary judgment is therefore GRANTED and defendants' cross-motion is DENIED. Because there does not appear to be any reason to resolve the state constitutional issues raised by plaintiff, the Court declines to rule on those issues, preferring to leave adjudication of a state constitutional right to the state courts wherever possible. To the extent plaintiff seeks any further relief in this matter, such as an award of

nominal damages and/or attorneys' fees,[9] he should file an appropriate motion within thirty days from the date of this Order. If no such motion is received by October 22, 2001, judgment shall be entered in favor of plaintiff and this case shall be dismissed.

DATED this 19th day of September, 2001.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

[9] The Court is not soliciting such a request for damages or fees. Mr. Cogswell and counsel have achieved the relief they requested and it would be an acceptable resolution of this case for plaintiff to end the litigation with no money changing hands.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GRANT T. COGSWELL, Plaintiff, v. CITY OF SEATTLE and CITY OF SEATTLE ETHICS AND ELECTIONS COMMISSION, Defendants.	No. C01-1209L ORDER DIRECTING ENTRY OF JUDGMENT BAR CODE CV01-01209 #00000041 (Filed Nov. 19, 2001)

This matter comes before the Court on plaintiff's "Motions for Entry of Judgment." Having reviewed the briefs and proposed orders submitted by the parties, as well as the remainder of the record, the Court finds that, in light of defendants' immediate compliance with this Court's September 19, 2001, decision and in the absence of any indication that they will not abide by it in the future, the constitutional violations of which plaintiff complained are not likely to reoccur, making injunctive relief unnecessary and inappropriate. The Clerk of Court is hereby directed to enter judgment as follows:

JUDGMENT IS HEREBY ENTERED in the above-captioned matter as follows:

That portion of Seattle Municipal Code 2.14.060(C) that states "[a] candidate's campaign statements shall not discuss the opponent" violates the First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and is therefore unconstitutional.

City of Seattle Ethics and Elections Commission 2001 Voters' Pamphlet Administrative Rule 5.3 violates the First Amendment to the United Sates Constitution, as incorporated by the Fourteenth Amendment, and is therefore unconstitutional.

City of Seattle Ethics and Elections Commission 2001 Video Voters' Guide for Participation Rule 3.5 that states "[i]n addition, the statements may not include a discussion of or reference to the candidate's opponent(s)" violates the First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and is therefore unconstitutional.

DATED this 19th day of November 2001.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States
District Judge

United States District Court
WESTERN DISTRICT OF WASHINGTON

GRANT T. COGSWELL,

Plaintiff,

v.

CITY OF SEATTLE and CITY OF SEATTLE ETHICS AND ELECTIONS COMMISSION,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C01-1209L

(Filed Nov. 19, 2001)

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

JUDGMENT IS HEREBY ENTERED in the above-captioned matters as follows:

That portion of Seattle Municipal Code 2.14.060(C) that states "[a] candidate's campaign statements shall not discuss the opponent" violates the First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and is therefore unconstitutional.

City of Seattle Ethics and Elections Commission 2001 Voters' Pamphlet Administrative Rule 5.3 violates the First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and is therefore unconstitutional.

City of Seattle Ethics and Elections Commission 2001 Video Voters' Guide for Participation Rule 3.5 that states "[i]n addition, the statements may not include a discussion of or reference to the candidate's opponent(s)"

violates the First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and is therefore unconstitutional.

DATED: 11-19-2001

BRUCE RIFKIN
Clerk
/s/ Vickie Karlberg
By , Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRANT T. COGSWELL,
Plaintiff-Appellee,
v.
CITY OF SEATTLE; CITY OF SEATTLE ETHICS AND ELECTIONS COMMISSION,
Defendants-Appellants.

No. 01-36162
DC No. CV 01-1209 RSL
W.D. Wash.

ORDER

(Filed Dec. 12, 2003)

Before: REAVLEY,* TASHIMA, and PAEZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Tashima and Paez vote to deny the petition for rehearing en banc and Judge Reavley so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are denied.

* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Revised Code of Washington

29.81A.010 Authorization – Contents – Format. At least ninety days before any primary or general election, or at least forty days before any special election held under RCW 29.12.010 or 29.13.020, the legislative authority of any county or first-class or code city may adopt an ordinance authorizing the publication and distribution or a local voters' pamphlet. The pamphlet shall provide information on all measures within that jurisdiction and may, if specified in the ordinance, include information on candidates within that jurisdiction. If both a county and a first-class or code city within that county authorize a local voters' pamphlet for the same election, the pamphlet shall be produced jointly by the county and the first-class or code city. . . .

29.81A.030 Administrative Rules. The county auditor or, if applicable, the city clerk of a first-class or code city shall, in consultation with the participating jurisdictions, adopt and publish administrative rules necessary to facilitate the provisions of any ordinance authorizing production of a local voters' pamphlet. . . . These rules shall include but not be limited to the following:

> (3) The basis for rejection of any explanatory or candidates' statement or argument deemed to be libelous or otherwise inappropriate. Any statements by a candidate shall be limited to those about the candidate himself or herself.

Seattle Municipal Code

2.14.060 Candidates' submissions.

C. The candidate's statement shall not exceed four hundred (400) words. No obscene, profane, libelous or defamatory matter, or language, which may impair circulation of the pamphlet through the mail, shall be accepted. A candidate's campaign statement shall not discuss the opponent.

Seattle Ethics and Elections Commission
2001 Voters' Pamphlet Administrative Rules

5.3 The written submittal must not discuss the candidate's opponent(s).

Seattle Ethics and Elections Commission
2001 Video Voters' Guide Rules for Participation

3.5 Limitations on Statements. The two-minute statements must not include obscene, profane, libelous, or defamatory matter, or language that may impair broadcast of the statements. *In addition, the statements may not include a discussion of or reference to the candidate's opponent(s).*